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Supreme Court of the United States

OCTOBER TERM, 1969

No. 542

INTERNATIONAL NICKEL CO. INC.,

Appellant,

vs.

CITY OF BAYONNE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

INTERNATIONAL NICKEL CO. INC.,

Appellant,

vs.

CITY OF BAYONNE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

The Opinion Below

The Supreme Court of New Jersey delivered no written opinion or discussion of the case, but affirmed per curiam the judgment of the Superior Court of New Jersey, Appellate Division, for the reasons expressed in the opinion therein (Appendix 20a). Copy of the opinions of the Division of Tax Appeals, the Superior Court of New Jersey, Appellate Division, and the per curiam opinion of the Supreme Court of New Jersey are attached to this Jurisdictional Statement (Appendix 1a, 6a and 20a).

Jurisdiction

The appeal herein is from a final judgment made and entered by the Supreme Court of New Jersey affirming the opinion of the Appellate Division of the Superior

Court (Appendix 1a). The judgment of the Appellate Division reversed the judgment of the Division of Tax Appeals and reinstated a personal property tax levied by the appellee's assessor for the tax year 1965, on appellant's personal property, notwithstanding appellant's assertion that the appellee had no jurisdiction over the property and that such a ruling was repugnant to the Due Process Clause of the 14th Amendment of the Constitution of the United States. Appellant contends that the Supreme Court of New Jersey's affirming per curiam opinion is violative of the Equal Protection and Due Process Clause of the 14th Amendment to the Constitution, as well as the Commerce Clause of the Constitution of the United States.

The final judgment appealed from was made and entered on June 2, 1969. Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of New Jersey on July 29, 1969.

The Supreme Court of the United States has jurisdiction to review the judgment by direct appeal under the provisions of 28 U.S.C. Sec. 1257 (2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case.

Delaware L. & W, R. Co: of Pennsylvania, 198 U.S. 341, 25 S. Ct. 669 (1905). *Connecticut General Life Insurance Co.* v, *Johnson,* 303 U.S. 77, 80, 58 S. Ct. 436 (1938). *Storaasli* v. *State of Minnesota, Minn.* 1931, 51 S .Ct. 354, 283, U.S. 57 (1931). *Frick* v. *Comonwealth of Pennsylvania,* 268 U. S. 473, 45, S. Ct. 603, 604 (1925). *American Oil Co.* v. *Neill,* 380 U.S. 451, 85 S. Ct. 1130 (1965). *Norfolk & W. Ry Co.* v. *Missouri State Com'n.,* 390 U.S. 333, 88 S. Ct. 995 (1968), *Lawrence* v. *State Tax Commission of Mississippi,* 286 U.S. 276, 52 S. Ct. 556 (1932).

The statutes of the State of New Jersey which are involved are Title 54 (Taxation), R.S. 54:4-1, at page 196, of the Official Reports and R.S. 54:4-11 at page 355, which provide as follows:

R.S. 54:4-1

> "All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter. Such property shall be valued and assessed at the taxable value prescribed by law * * *."

N.J.S.A. 54:4-11—(Taxable Value Of Tangible Personal Property Used In Business, percentage levels).

> "The taxable values of tangible personal property used in business in each taxing district shall be at those percentage levels of the fair value thereof as are set forth in this section. The taxable value shall be determined as of January 1, 1964, which shall be the listing date with respect to taxes payable in the year 1965, and as of a listing date of January 1, annually thereafter, which date shall be the date as of which the assessment is made. The said levels shall be as follows: * * *"

The Supreme Court of New Jersey ruled that the above cited portions of the statutes permitted the City of Bayonne to assess and tax appellant's personal property which had been permanently removed from the Tax District substantially prior to the commencement of the tax year. The Court rejected appellant's arguments that not only was such a construction not warranted by the language of the applicable statutes but, further, that such an inter-

pretation was in violation of the Due Process Clause of the 14th Amendment. Appellant further asserts that its rights under The Equal Protection and Commerce Clauses of the United States Constitution were violated by the Court's ruling.

The Questions Presented Are Substantial

The Supreme Court of New Jersey has determined that R.S. 54:4-1 and R.S. 54:4-11, as amended, permit a municipality to tax for the year 1965 personal property which was not within the municipality for that year. Under that interpretation of the statutes, a municipality may tax personal property for the year 1965 on the sole basis that the property was located in the municipality on the statutory assessment date of January 1, 1964. The Court has ruled that the assessment and tax may stand notwithstanding that the personal property was permanently removed from the municipality subsequent to the assessment and prior to the commencement of the year for which the taxes had been assessed. In effect, the Court has assigned no constitutional significance to the concept of a tax year. The principal questions are:

1. Whether a reasonable construction of the Tax Statutes permits the City of Bayonne to tax for the year 1965 property which was not within the City of Bayonne during 1965.

2. Whether the construction of the tax statutes to mean that property may be taxed for the year 1965, when it was outside the municipality's jurisdiction, would render it unconstitutional and, therefore, unenforceable.

3. Whether the taxing for the year 1965 of personal property present within the municipality on a statutory

assessment date but removed from the State before the commencement of the tax year was unconstitutional as a violation of the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States, as well as the Commerce Clause of the Constitution.

4. Whether the ultimate effect of the statutes as construed by the Court and applied and enforced by the municipality amounts to a violation of the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States, as well as the Commerce Clause of the Constitution.

Statement of the Case

NOTE: All references herein to the Appendix are to the Appendix of Respondent-Appellant in the Appellate Division of the Superior Court of New Jersey.

During the year 1964, International Nickel Company, Inc., owned certain personal property in the City of Bayonne. It was permanently removed from the City of Bayonne and from the State of New Jersey during the latter part of 1964, and was totally removed prior to January 1, 1965 (D 12-A-15 to 41; D 13A-1).

On December 31, 1964, appellant sold its real estate located in the City of Bayonne (D 12A-35 to 37). It was not assessed by the City of Bayonne for real property for the year 1965 (D 16A-10). The assessor knew that after January 1, 1965, appellant did not own real estate in the City of Bayonne (D 16A-14). However, the appellee assessed for the tax year 1965, personal property owned by the appellant and located in Bayonne on January 1, 1964. The amount of the assessment was $221,362.76 (D 2A-19). Ap-

pellant appealed the assessment of personalty for the year 1965.

On November 15, 1965, the Hudson County Board of Taxation affirmed the assessment (D 2A-27). Appellant appealed from the Hudson County Board of Taxation to the State of New Jersey, Department of Treasury, Division of Tax Appeals (D 2A). The Division of Tax Appeals in Docket No. L 405-65 rendered an opinion (Appendix 1a) and signed a judgment dated May 21, 1968, cancelling the 1965 tax assessment. The Division's cancellation of the assessment was predicated on a determination that the applicable tax statutes which provided only for taxation of property within the jurisdiction of the state precluded the assessment of personal property which was physically beyond the border of the Taxing District before the commencement of the Calendar tax year. The Taxing District argued that the status and location of the taxpayer's property on the stafutory assessing date, that being January 1, 1964, permitted it to impose the tax for the 1965 tax year, notwithstanding the complete removal of the taxpayer's property prior to the commencement of 1965. The taxpayer argued that such an interpretation of the tax statutes would render it unconstitutional as violative of the Due Process Clause of the 14th Amendment to the United States Constitution. The Division of Tax Appeals sustained the taxpayer's constitutional argument and cancelled the assessment. The Division held that as there was no personal property in this state for the year for which the tax was sought to be levied, it followed from a reading of the statute that there was nothing to tax (Appendix 3a).

The Taxing District appealed the judgment of the Division of Tax Appeals to the Appellate Division of the Superior Court. The judgment was reversed, and the assessment was restored (Appendix 18a). The Appellate Division

held initially that the entire tenor of the tax statutes, as well as a practical construction of the statutes, sustained the interpretation "that the statutory assessing date controlled the incidence of the legal place of assessment of tangible personal property (subject to qualifying principles as to non-taxable status of such property in the Taxing District, as where only temporarily situated, or in transit in interstate or foreign commerce." (Appendix 10a). The subsequent removal of the property from the State prior to the commencement of the tax year did not afford constitutional defenses that would abrogate the assessment and tax. The appellant raised the cardinal constitutional limitation of a state's taxing power that a Taxing District may not tax property located outside its jurisdiction. The Court noted that while the decisions cited by the appellant did espouse the taxpayer's traditional constitutional rights to be applied in limitation of a state's taxing power, each case was distinguished from the matter sub judice. None of the cases directly involved the all important issue of the tax consequences of personal property present within a district on a statutory assessing date substantially prior to the tax year and then subsequently removed from the Taxing District prior to the commencement of the tax year.

The effect of the Interstate and Foreign Commerce Clauses of the Constitution were commented on by the Court (Appendix 14a). The Court found the cases inapplicable to the present situation, as it determined the presence of appellant's property within the Taxing District as of January 1, 1964, to be of a permanent character (Appendix 18a). The Court ruled that while the taxing scheme permits the tax to be designated for the calendar year 1965, the tax in essence was for services rendered the property during the year 1964 (Appendix 16a). With this in mind, a withdrawal of property after Jan. 1st 1964 and prior to

1965 demonstrates the inequity of the situation in view of the full tax year assessment. The Court assigned no constitutional significance to the concept of a tax year (Appendix 17a) such that tangible personal property permanently absent from the state for that year would automatically invalidate a prior assessment for that particular year. It ruled so, particularly where the assessment was not unduly remote and was reasonably referable to that calendar tax year. The appellant petitioned for certification to the Supreme Court of the State of New Jersey, said petition being granted on February 25, 1969. The case was argued in the Supreme Court of New Jersey on May 19, 1969.

On June 2, 1969, the Supreme Court, in a per curiam opinion, affirmed the judgment of the Appellate Division of the Superior Court for the reasons expressed therein. The Supreme Court's mandate was entered on June 12, 1969. On July 29, 1969, notice of appeal to the Supreme Court of the United States was served upon all counsel of record and was filed in the Supreme Court of the State of New Jersey.

I

Statement of the reasons why the questions presented are so substantial as to require plenary consideration.

A. *The Court's construction of the tax statutes was unreasonable when it determined that a municipality might tax for the year 1965, tangible personal property that was permanently removed from the municipality prior to the commencement of the 1965 tax year solely on the basis that the property was present within the municipality on a statutory assessment date, of January 1, 1964.*

The Supreme Court of the State of New Jersey has upheld the tax assessment levied upon appellant's property pursuant to certain state tax statutes, notwithstanding appellant's argument that the statutes do not permit the municipality to tax property located outside its jurisdiction. The court upheld the City of Bayonne's power to tax appellant's property which had been permanently removed from the taxing district prior to the commencement of the tax year. The court's sole basis for sustaining the assessment and tax lay in the fact that the appellant's property was present within the taxing district on a statutory listing or assessment date, which date preceded by one year, the tax year for which the assessment was levied.

The statutory provision relied upon by the court (R.S.54:4-11) provides that "the taxable values of intangible personal property . . . shall be determined as of January 1, 1964, which shall be the listing date with respect to taxes payable in the year 1965". The appellant argued that the aforementioned provisions of the tax statute is subject to the foundation provisions of R.S. 54:4-1 which precedes R. S. 54:4-11 and provides:

"*All property real and personal within the jurisdiction of this state* not expressly exempted from taxa-

tion or expressly excluded from the operation of this chapter shall be subject to taxes annually under this chapter. Such property shall be valued and assessed at the taxable value prescribed by law." (Emphasis added)

This statutory provision clearly defines which property is subject to taxation. It is the interpretation of this provision that appellant relied upon to sustain its contention that its property was not taxable for the year 1965.

As a result of the New Jersey Supreme Court's upholding the tax assessment in question, the appellant's property has been taken in violation of the clear language of the statute that property must be present within a taxing district to afford a jurisdictional basis for the tax. This element of valid taxation is completely absent from the case at hand.

In *American Oil* v. *Neill, supra,* an appeal concerning the constitutionality of a state taxing statute, the court said that it would consider itself bound by the state court's construction of the tax statute only when the statute had been reasonably interpreted by the state court. Appellant respectfully contends that the Supreme Court of the State of New Jersey has not reasonably interpreted the clear language of the statutes in this case. Accordingly, this element of the appeal is open to judicial review.

Here a municipality's taxing power has been extended to property outside the taxing district's jurisdiction. The traditional principle that all property must be within a state in order to render it liable for taxation has been seriously weakened by the court's unreasonable and unwarranted construction of the New Jersey tax statutes. In circumvention of the principle that property must be within a jurisdiction in order to afford a sound basis for taxation, the court has substituted a flexible statutory

listing or assessment date as the jurisdictional basis for tax. Under these circumstances, the Federal questions are apparent and are of sufficient substance to require a plenary consideration by this court.

The Division of Tax Appeals, in examining the interrelationship of these two sections, recognized that the section relied upon by the City of Bayonne R.S. 54:4-11 was only the means used to determine value.

> "It appears to us that the section upon which the respondent relies, namely, R.S.54:4-11, is referrable to the last sentence, quoted immediately above, and has to do with the means of valuing and assessing and the time thereof, for the obvious purpose of appropriate administration of the taxing Act. It does not depart from the cardinal principle that the right to tax depends upon power over the subject matter taxed, as recognized by the words 'within the jurisdiction of this State' as stated in R.S.54:4-1. The latter section states 'what' is to be taxed; the section relied on by the respondent prescribed implementation for R.S. 54:4-1." (Appendix 3a)

The Division, with its particular expertise in tax matters, determined that the municipality might not tax property which had been permanently removed from the municipality and the state prior to the tax year. The Division immediately recognized the interrelationship of the two sections of the statutes and determined that the section relied upon by the City of Bayonne, R.A. 54:4-11, merely provided a means of determining value of the personal property. It recognized the rule that power to tax depends upon power over the subject matter taxed, as recognized by the statutory language of R.S. 54:4-1. Accordingly, the Division of Tax Appeals concluded:

> "There being no personal property in this state for the year for which a tax is sought to be levied . . . . there is nothing to tax." (Appendix 3a)

In reversing the Division of Tax Appeals, the Appellate Division stated that while no New Jersey statute expressly provided that tangible personal property was taxable by a municipality in which it was found on the statutory assessing date, the entire tenor of the statutes spells out that unmistakable intent. (Appendix 9a)

The Appellate Division clearly utilized an unreasonable construction of the statutes to achieve a revenue producing result. It did not adequately consider that the assessing date was merely a means of assisting taxing authorities to determine the value and status of the property and to implement and administer the tax Act. *Lehigh Valley R. Co.* v. *New Jersey State Board of Tax Appeals and Estimate*, 105 N.J. L. 349, 351 (E. & A., 1929). The court's opinion realized the practicalities of permitting a reasonable amount of time between the assessing date and the commencement of the tax year in order to permit administrative handling of the tax assessment. The court further stated that the absence from a taxing district of the assessed personal property during that particular tax year would not automatically invalidate an assessment where the property was within the state on a certain date preceding the tax year, if such date were not unduly remote and could be considered reasonably referable to that year. Significantly, the Appellate Division's opinion assigns no particular constitutional significance to a tax year. However, it goes on to say that the statutory assessing date must not be unduly remote from the tax year in question. The opinion does not stand the test of logic. The ruling of the court in its eagerness to permit the assessment to stand goes so far as to say that the tax to be paid in 1965

was actually the tax for governmental services rendered the taxpayer during 1964 when the property was in Bayonne for part of the year. That position is contrary to the law as found in *Lehigh Valley R. Co.* v. *N.J. State Board of Taxes and Estimate*, (*supra*). There, the court examined a similar tax statute dealing with railroad property. The court in that case refuted the argument that the tax for the year 1923 was actually the tax for 1922.

The Appellate Division's interpretation of the statute as affirmed by the Supreme Court's *per curiam* opinion is not justified by the prior judicial decisions of our State. *Gualano* v. *Bd. of Estimate of Elizabeth School District*, 72 N.J. Super. 7 (A.D., 1962); *Block Ice and Cold Storage Co. Inc.* v. *Borough of Manasquan Division of Tax Appeals, State of New Jersey*, Docket No. 2907D, October 5, 1965.

B. *The construction afforded the applicable tax statutes by the Supreme Court of New Jersey which permit property to be taxed for the year 1965, when it was not located within the Taxing District during that year renders it unconstitutional in violation of the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution, as well as the Commerce Clause of the Constitution.*

The Supreme Court of the State of New Jersey has upheld the tax assessment levied upon appellant's property pursuant to certain state tax statutes, notwithstanding appellant's argument that the assessment and tax were violative of appellant's rights under the United States Constitution.

The taxation of property not located in the taxing district is constitutionally invalid as a violation of the due process clause and as an illegal restraint on commerce. *Norfolk & W. Ry. Co.* v. *Missouri State Tax Com'n.*, *supra*. While the Norfolk case, supra, involved rolling railroad

stock and was considered by the courts below, appellant does consider the general tax principle of due process and commerce referred to in the decision as applicable to the present situation.

The reasons underlying the applicability of the due process clause of the Fourteenth Amendment were clearly stated in *Frick v. Commonwealth of Pennsylvania*, supra where is was stated:

> "... the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; Secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction it cannot give them any extraterritorial operation; and thirdly, that as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicile of the owner."

The importance of our being afforded further opportunity to review this matter is apparent. The lower court's decision has intruded on the appellant's established constitutional rights. *State v. Collector of Railway*, 24 N.J.L. (S.Ct., 1853). *N.Y. Central R.R. Co. v. Dept. of Taxation*, 137 N.J.L. 288, 294; aff'd 1 N.J. 298 (1949). The result of the ruling is substitution of an unreasonable and arbitrary statutory assessment date for the actual presence of personal property within a tax district. Accordingly, the decision is an unreasonable and unconstitutional circumvention of established constitutional principles. The appellant has consistently argued that constitutional significance must be ascribed to the statutory concept of a tax year and to the undisputed fact that appellant's property had permanently been removed from the tax district prior to the commencement of the tax year.

The significance of the statutory listing date within the context of our situation has never been affirmatively ruled on as being the dispositive factor establishing the appropriate tax situs of property. This is a unique question and constitutes a matter of first impression. This appeal is of substantial import to the business community.

There is no question that the use by the State of a listing date as the determinative factor in taxing property could be used as a guise to tax property outside the jurisdiction of the state. That could lead to double taxation. In the instant case the listing date antedated by a full year the beginning of the tax year. Notwithstanding that the appellate division admits that such a listing date should not be unreasonably remote from a tax year it still asserts in its decision the constitutional insignificance of the concept of a tax year. The apparent reason for the insignificant consideration given the term tax year appears to be an attempt by the courts to find a way of validating the assessment. It is an essential test to the constitutionality of a state taxing statute that the state has offered services and benefits in return for the tax sought. *Detroit Edison Co. v. East China Tp. School Dis. No. 3*, 247 F. Supp. 296, affirmed 378 F.2nd 225, cert. den. 88 S.Ct. 296, 389 U.S. 932 (1967).

The lower courts, in order to pass this constitutional test, artificially charged past municipal services to the tax year 1965.

Appellant's argument is simple. Presence of property within a taxing district on an assessment date prior to the commencement of the tax year may not be determinative of the taxability of that property. To hold so does injustice to appellant's vested constitutional rights. As we have seen here, the assessment date might pre-date the tax year by as much as one year and conceivably by a longer period.

This flexible and readily changeable date may not be a valid substitute for firm and jurisdictional ground to tax personal property. The Constitution of the United States affords a party the cherished right to be safe and protected in its property interest. The appellant respectfully contends that the determination below violates that right.

CONCLUSION

The Supreme Court of the United States has jurisdiction to review the judgment under appeal. The matter is one of first impression, and the Federal questions are substantial. The construction of the tax statutes by the Supreme Court of the State of New Jersey is unreasonable in view of its tortuous impact, the judicial precedents within this state and the clear language of the statute. Further, the operational effect of the statutes as construed by the State of New Jersey violates appellant's constitutional rights.

We respectfully request that this Court find this case an appropriate one for reversal.

Respectfully submitted,

MILTON, KEANE & DEBONA

By PROSPERO DEBONA
Attorneys for Appellant

APPENDIX

APPENDIX

Opinion by Stanziale, J. in Division of Tax Appeals

May 8, 1968

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF TAX APPEALS

Docket No. L 405-65

INTERNATIONAL NICKEL CO.,

Petitioner,

vs

CITY OF BAYONNE,

Respondent.

(Case No. 71, Calendar of September 27, 1967,
Heard January 23, 1968 Newark.)

Appearances:

Messrs. Milton, Keane & De Bona
By: John J. Haulon, Jr. Esq. for Petitioner

Nicholas A. Panepinto, Esq. for Respondent

STANZIALE, J.:

This is an appeal by the International Nickel Co. of the assessment of the City of Bayonne for the year 1965 in the amount of $221,362.76 on personal property allegedly located in Block 432 Lot 1A, Block 437 Lot 1A, and Block 431½ Lot A, Oak Street, Bayonne, N. J.

A stipulation of facts and memorandas of law were submitted by the parties. Since the parties were not in agree-

ment as to when the personal property was removed from the jurisdiction, a hearing was scheduled and testimony was presented by the parties.

Petitioner produced testimony by its chief accountant that prior to January 1, 1965, to wit., on December 31, 1964, Petitioner owned no personal property on the premises described, the same having been transferred to Sterling Forest, N. Y. It also appeared that on December 31, 1964 the company sold all its real estate at the said location and the assessor for the City on cross examination admitted that there had been no assessment of real property against International Nickel for the year 1965, the assessor knowing that during that year International did not own the real estate at the said location. No moving permit is required in the City of Bayonne for the moving of personal property and no evidence was adduced to show that any personal property of petitioner was in the State of New Jersey at any time during the year 1965.

Respondent City of Bayonne contends that by reason of R. S. 54:4-11 "The taxable values of tangible personal property . . . shall be determined as of January 1, 1964, which shall be the listing date with respect to taxes payable in the year 1965, and as of a listing date of January 1st annually thereafter, which date shall be the date as of which the assessment is made," and that, therefore, the presence of personal property in Bayonne during 1964 results in a tax for the year 1965. (It is conceded that the taxes for the year 1964 were fully paid by petitioner). Hence, following the filing of PT-1 and PT-2 forms on August 31, 1964 showing a depreciated book value of personal property in the sum of $1,064,244.03, the respondent applied the common level of .208 and arrived at the disputed tax.

Opinion by Stanziale, J., in Division of Tax Appeals

R. S. 54:4-1 provides:

> "All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter. Such property shall be valued and assessed at the taxable value prescribed by law . . ."

It appears to us that the section upon which the respondent relies, namely R. S. 54:4-11, is referable to the last sentence quoted immediately above, and has to do with the means of valuing and assessing and the time thereof, for the obvious purpose of appropriate administration of the taxing Act. It does not depart from the cardinal principle that the right to tax depends upon power over the subject matter taxed, as recognized by the words "within the jurisdiction of this State" as stated in R. S. 54:4-1. The latter section states "what" is to be taxed; the section relied on by the respondent prescribed implementation for R.S. 54:4-1.

There being no personal property in this State for the year for which a tax is sought to be levied, it follows from the above quoted statute that there is nothing to tax. See *N. Y. Central R. R. Co.* v. *Dept. of Taxation &c.*, 137 N. J. L. 288, affd. 1 N. J. 298 (1949). The preparation to tax by filing of the PT forms and their receipt by the municipality cannot have the effect of making the putative subject matter taxable.

Judgment for petitioner accordingly.

Order by Appellate Division Reversing Decision of Tax Appeals Determination

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Appeal Docket No. A-1400-67

Administrative Action On Appeal Judgment and Mandate on Reversal

---

CITY OF BAYONNE,

Defendant-Appellant,

vs.

INTERNATIONAL NICKEL CO., INC.,

Plaintiff-Respondent,

It is hereupon ordered and adjudged that the determination of the said Division of Tax Appeals, Department of the Treasury, State of N.J. is reversed with costs and that the record be remitted to the Division of Tax Appeals, Department of the Treasury, State of N.J. to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

Order by Appellate Division Reversing Decision of Tax Appeals Determination

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.

Judgment Entered: December 13, 1968

Mandate Issued: December 24, 1968

ORIGINAL FILED
Dec. 13, 1968

MORTIMER G. NEWMAN, JR.
Clerk

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

I hereby certify that the foregoing is a true copy of the original on file in my office.

MORTIMER G. NEWMAN JR.
Clerk

Opinion by Conford, S.J. on Appeal From Division of Tax Appeals

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-1400-67

[SAME TITLE]

Argued November 12, 1968—Decided December 13, 1968.
Before Judges Conford, Kilkenny and Leonard.

On appeal from the Division of Tax Appeals, Department of the Treasury, State of New Jersey.

Mr. Nicholas A. Painepinto argued the cause for appellant.

Mr. Prospero DeBona argued the cause for respondent (*Messrs. Milton, Keane & DeBona*, attorneys; *Mr. John B. Wefing*, on the brief).

Mr. Arthur J. Sills, Attorney General of New Jersey, filed Statement in Lieu of Brief on behalf of respondent Division of Tax Appeals (*Mr. Charles R. Landesman*, Deputy Attorney General, of counsel).

The opinion of the court was delivered by CONFORD, S.J.A.D.

The City of Bayonne appeals the cancellation by the Division of Tax Appeals of a personal property tax levied by its assessor for the tax year 1965 on personal property of International Nickel Co. The taxpayer possessed taxable personal property, used in its business, in the Bayonne taxing district on January 1, 1964, the assessing date for

1965 taxes, *N.J.S.A.* 54:4-11 (as amended by *L.* 1964, *c.* 141), but removed all of it from this State to the states of New York and West Virginia during the year 1964, so that none of it was in Bayonne on January 1, 1965 or thereafter.

The action of the Division was predicated on the theory that *N.J.S.A.* 54:4-1, providing for taxation of real and personal property "within the jurisdiction of this State," precluded the assessment for 1965 by a New Jersey taxing district of personal property which was physically beyond the borders of the State before the calendar year 1965 began. Bayonne contends that the status and location of the property on January 1, 1964, the statutory listing or assessing date for the tax year 1965, controls as to Bayonne's right to impose the tax for that year. The taxpayer responds that Bayonne's construction of the tax statute would render it invalid as violative of the due process clause of the 14th Amendment to the United States Constitution.

Our careful consideration of the arguments of the parties and our independent research lead us to the firm conclusion that the taxing district's appeal must be sustained and the assessment restored. The legislative intention is that property found in the taxing district on the statutory assessing date is taxable therein for the corresponding tax year, although removed therefrom subsequent to the assessing date. Our tax statutes, as thus construed, do not offend due process even where the removal antedates the so-called tax year.

I.

A review of the pertinent legislation should be preceded by the observation that beginning in 1960 there was in this State a period of intense public controversy over, and of a

number of legislative amendments of the law in respect of the taxation of tangible personal property, especially such as is used in business. See, *e.g., Saitz* v. *Kingsley*, 37 *N.J.* 566 (1962); *Zito* v. *Kingsley*, 92 *N.J. Super.* 37 (*App. Div.* 1966). Detailed review of all of these enactments, several of which remained in suspension for varying periods of time, need not here be undertaken, as none of this legislation affects the basic principle we find to have characterized our tax law for decades, *i.e.*, that the tax status of property, whether for purposes of exemption, valuation or assessing location, is fixed as of the assessing date, except where in some instances it has been specifically otherwise provided by the Legislature.

N.J.S.A. 54:4-1, prior to amendment by *L.* 1960, *c.* 51, called for the taxation of "all property real and personal within the jurisdiction of this State [not expressly exempted or excluded]" annually at its true value and recited that "[a]ll property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

N.J.S.A. 54:4-9, prior to the 1960 amendment, provided "The tax on all tangible personal property in this State shall be assessed in and for the taxing district where the property is found."

The 1960 statute eliminated "true value" as the basis for assessment of tangible personal property and introduced a new classification of taxable personal property used in business. The assessing standard for the latter was to be "fair value," presumed to be the net book value of the property "as of the listing date." *L.* 1960, *c.* 51, Sections 4,

5: Later amendments provided for new and lower valuation bases and tax rates for assessment of various categories of tangible personalty used in business.

The assessing date for the new tax category of tangible personal property used in business was changed by *L.* 1960, c. 51, § 8 from the prior October 1 to the prior January 1, the act providing that January 1, 1961 "shall be the listing date with respect to taxes payable in the year 1962," and correspondingly for subsequent tax years. (For convenience we use the term "assessing date" rather than "listing date" herein.) This scheme was carried forward through the tax year 1965 and thereafter by *L.* 1964, c. 141, § 3 ("The taxable value shall be determined as of January 1, 1964, which shall be the listing date with respect to taxes payable in the year 1965," and correspondingly for subsequent tax years).

Insofar as concerns the *place* of taxation of tangible personal property used in business, the 1960 act (c. 51) retained the previous basic concept, and called for assessment thereof "at the general tax rate of the taxing district wherein such property is found, for the use of such taxing district." Section 7, amending *R.S.* 54:4-2. This concept as to the place of taxation was continued in *L.* 1964, c. 141, above referred to, as was the long-existent rule of personal liability for such taxes of the "person lawfully assessed." (Section 1).

While apparently no New Jersey statute, past or present, can be found expressly to say, in so many words, that tangible personal property is assessable by that taxing district in which it is found on the assessing date, the whole tenor of the taxing statutes as of any given time in our modern history has spelled out that unmistakable intent. It was stated, for example, in *Shiffman's Inc. v. Ridgway*, 69

N.J.L. 113 (*Sup.Ct.* 1903), that "visible personal property" is assessable at the place where found "on the day . . . for commencing the assessment" (a then-current paraphrase for "assessing date," "tax date," etc.). To the same effect see *Teinaut v. State Board of Taxes and Assessments*, 95 *N.J.L.* 465 (*E. & A.* 1921) (syllabus). This has, to our knowledge, been the practical construction accorded the statutes, over the years, by the taxing authorities of this State on every level, and we are aware of no challenge heretofore to the principle that the statutory assessing date controls the incidence of the legal place of assessment of tangible personal property (subject to qualifying principles as to nontaxable *status* of such property in the taxing district, as where only temporarily situated, or in transit in interstate or foreign commerce, etc., when found in such taxing district on the assessing date).

Indeed, we do not understand the taxpayer to challenge the foregoing, except in application to a case like this where the property in question has been removed from the state taxing jurisdiction prior to commencement of the calendar tax year. In such instance, so it is argued, the United States Constitution prohibits the levy even if the property was found there on the assessing date; consequently the taxing statutes should be construed consonantly with the constitutional rule. We address ourselves to that argument.

II

Preliminarily, we observe that in none of the cases cited by the taxpayer or the Division of Tax Appeals, is there a square holding supportive of the position asserted. Indeed, we find no prior case in which a court has been asked to determine that property found in a state on the as-

Opinion by Conford, S.J. on Appeal From Division of Tax Appeals

[redacted] date fixed by the statutes thereof in reference to a particular tax year is constitutionally untaxable by that state or its political subdivisions because not present therein during the tax year.

We deal first with the New Jersey decisions relied upon by taxpayer. It quotes from *Bogota v. Brewster Equip. Co.*, 83 *N.J. Super.* 586, 606 (*App. Div.* 1964):

> "To allow Bogota to tax tangible personalty located in California, Utah, New York and Pennsylvania *on October 1, 1959 and October 1, 1960* would result in a denial of due process of law—such property then being permanently located in those states and employed there in the prosecution of Brewster Company's business." (Emphasis added.)

The foregoing was written in reference to a holding that road construction equipment never within the boundaries of the State was not assessable by a New Jersey taxing district merely because the offices of the owner-corporation were situated there. It was held that the property in question was *on the respective assessing dates* physically located and intended for permanent use and disposal in other states—therefore had a taxable situs there and not in New Jersey. Actually, the reference to the assessing dates—October 1, 1959 and October 1, 1960—in the quoted excerpt from the *Brewster* opinion, is inferential that if the property were in New Jersey on the mentioned taxing dates it would be assessable in this State.[1]

[1] However, mere presence of personal property in a taxing district on the assessing date will not assure its taxability there if it was present there only temporarily. In such case it is assessable at the residence of its owner. *George M. Brewster & Son, Inc. v. Bor. of Bogota*, 20 *N.J. Super.* 487, (*App. Div.* 1952)

Opinion by Conford, S.J. on Appeal From Division of Tax Appeals

In *N. Y. Central R. R. Co. v. Dept. of Taxation, etc.*, 137 *N.J.L.* 288 (*Sup. Ct.* 1948), cited by the Division and taxpayer, the court, while recognizing the general principle "that the power of the state to tax is limited to subjects within its jurisdiction" (at 294), was confronted only with the question whether floating equipment of the railroad taxpayer used for transportation of freight in the Hudson River and New York Harbor was validly taxed by New Jersey under the Railroad Tax Law of 1941, which provided for a formula of assessed valuation based upon proportionate time of presence of the equipment in this State. The court sustained the tax as against a contention that the sole taxable situs of the property was New York, where the owner corporation was domiciled. It is of present interest that there was no question raised concerning the validity of the statutory formula which based the proportionate valuation aforementioned on experience during the calendar year *preceding* the tax year.[1] In other words, the incidence of location of the property *during the tax* year was irrelevant to the validity of the assessment.

The leading federal decision for the proposition that a state's effort to assess property beyond its borders offends the due process rights of the taxpayer, and cited by the respondent herein, is *D. L. & W. R. Co. v. Pennsylvania*, 198 *U.S.* 341 (1906). The taxpayer was subjected by Pennsylvania to a corporate capital stock tax without allowing it a

[1] It may further be noted that the railroad tax law, like the personal property tax act here involved, fixes the assessing date for all property in railroad use at January 1 of the year preceding the tax year. However, it expressly excludes property passing out of railroad ownership between January 1 and October 1. *N.J.S.A.* 54:29A-17 (presumably to enable it to be assessed locally rather than by the State).

deduction for coal owned by the company which, by the time of the assessing period, referred to in the opinion as the "time the appraisement was made" (at 345), had been transported out of the state and was being held by the taxpayer elsewhere awaiting sale to the company's customers. The United States Supreme Court held that the taxation of the capital stock was, in effect, a taxation of the company assets including the coal in question, and therefore, to the extent that the assessed valuation reflected the value of tangible property beyond the borders of the state as of the time of statutory tax appraisal of the property, it constituted a taking of the taxpayer's property without due process of law. It is apparent from the court's analysis that, far from supporting the present taxpayer's position, the decision implies the contrary. It holds that the critical time for determining whether the property is constitutionally untaxable by the state because absent is the time as of which the statutory appraisal is to be made (in other words, the assessing date). "Taking the different prices of the stock at different times in the year, and the average price thereof, and otherwise following the provisions of the statute, simply makes a way of finding the value of the stock between the 1st and 15th of November in each year. That is the material time when the value is to be ascertained, and at this time the coal was not in the state;" (198 *U.S.*, at 357-58).

It is to be noted that the result of the decision was that Pennsylvania lost the tax even though the coal, or part of it, was within its borders at some time or times *during the tax year*, for the sole reason that it was not present there

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The Pennsylvania statute provided for assessment of the stock at the value between November 1 and November 15 of each year for the tax year ending in said November

as of the assessing date. For the same result, in a case where the assessing date was fixed at the beginning of the tax year, see *Overstreet* v. *Ty-Tan, Inc.*, 48 *So. 2d* 158 (*Sup. Ct.Fla.* 1950). The present Bayonne assessment accords with the rule of the *D. L. & W. R. Co.* case, since the property in question *was* in Bayonne on the assessing date.

Other decisions of the United States Supreme Court cited by respondent for the constitutional rule espoused are not here helpful, since none of them involved any question concerning the determinative character of the statutory assessing date in relation to the absence of the taxed property from the taxing jurisdiction. See *Norfolk & Western Railway Company* v. *Missouri State Tax Commission*, 390 *U.S.* 317 (1968); *Frick* v. *Pennsylvania*, 268 *U.S.* 473 (1925); *Union Refrigerator Transit Co.* v. *Kentucky*, 199 *U.S.* 194 (1905).

In the closely analogous field of constitutional limitation of state taxing power in respect of goods being shipped in foreign commerce, both the courts and all the parties involved in *Empresa Siderurgica, S.A.* v. *Merced*, 337 *U.S.* 154 (1949), affirming the decision of the California Supreme Court, 32 *Cal. 2d* 68, 194 *P. 2d* 527 (1948), assumed without question that the exempting export status of the property in question was to be determined as of the California statutory tax date (March 5, 1945, for the tax year 1945-1946) (337 *U.S.*, at 155). It is further significant that the property held taxable by California because not in course of transit as of the tax date was entirely out of the state on an ocean carrier well before the end of the tax year. (337 *U.S.*, at 155).

Nor is respondent's thesis aided by other out-of-state cases it cites. In *Brock & Co.* v. *Bd. of Sup'rs. of Los An-*

geles County, 8 *Cal. 2d* 286, 65 *P. 2d* 791 (*Sup.Ct.* 1937), the court rejected a jeweler's appeal from a 1935 assessment by the county on part of his jewelry stock-in-trade which he had transported to Hawaii prior to the "tax date" (March 4, 1935) and brought back to Los Angeles soon after that date. The purposes of the trip were concededly two: (a) to show the articles to potential customers in Hawaii and (b) to evade taxation on the property for the year 1935. The taxpayer's argument was that the motive of removal was irrelevant—the property was excluded from taxation because absent from the state on tax day. The rejection of that position by the court, like the reasoning in our own decision in *George M. Brewster & Son, Inc. v. Bar of Bogota, supra*, n. 1, was that the removal of the goods from their permanent Los Angeles situs was merely temporary, and thus insufficient to transfer their taxable situs. It is not our position in the instant case that *mere* presence of personal property within a state at the assessing date is determinative of taxability therein. The presence must be of a permanent character as of that date, as was the case with the present respondent's property as of January 1, 1964.

In *Commonwealth v. Westinghouse Air Brake Co.*, 251 *Pa.* 12, 95 *A.* 807 (*Sup.Ct.* 1915), also cited by respondent, the significance of the assessing date was not an issue. The case simply follows the general, undisputed rule precluding taxation of property permanently beyond the borders of the taxing state.

The controlling significance of the assessing date was adjudicated in *Overstreet v. Franchise Tax Bd.*, *supra*, and also in *Stokes, Inc. v. Gilmartin*, 189 *Or.* 427, 221 *P. 2d* 914 (*Sup.Ct.* 1950), cert. den. 340 *U.S.* 920 (1951), a case pre-

marily concerned with a contention that the goods taxed were exempt as being in the course of interstate commerce, where it was said (at 919), " * * * the law presumes that all property, such as that before us, is subject to taxation at the place where it was on tax day."

Reflection concerning the rationale for the due process basis for denying the power of taxation over personal property absent from the state will reflect the lack of merit in respondent's invocation of the doctrine here. The theory is that for a state which offers no governmental services in relation to property, as where it is physically absent from the jurisdiction, to levy a tax on it is so unfair and unjustified as to be tantamount to taking the taxpayer's property without due process. *Union Refrig. Transit Co. v. Kentucky, supra* (199 *U.S.*, at 202); "the [due process] question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State," *Norfolk & Western R. Co. v. Missouri Tax Com., supra* (390 *U.S.*, at ——, *n.* 5).

The tax the Division nullified here was for governmental services and protection which taxpayer's personal property was receiving from Bayonne and from New Jersey as of January 1, 1964, when that property was permanently situated in Bayonne. The fact that in the statutory tax scheme the tax is denominated as "for" 1965 and permits the taxpayer to pay it in the latter calendar year does not gainsay the truth of the foregoing assertion. Nor does that fact palliate the escape from tax contribution for the governmental services and protection as of the date referred to if International Nickel were to succeed in voiding this assessment. The taxes paid by the corporation to Bayonne in 1964 do not cover the obligation, as those were for the protection and services it was receiving as of January 1,

1963. Under our statutory scheme no taxpayer pays taxes for more tax years than the number of assessing dates on which he possesses tangible personalty within the borders of the state.

There is no talismanic quality or significance of constitutional dimension in the "tax year" such that absence from the State of personal property all during that year should automatically invalidate an assessment denominated "for" that year but statutorily based upon location in the State of property upon a certain date preceding, but not unduly remote therefrom, and reasonably referable to that year. The tax here contested does, in the language quoted above from *Norfolk & Western R. Co. v. Missouri Tax Com.*, "in practical operation [have] relation to opportunities, benefits, or protection conferred or afforded" by New Jersey and Bayonne.

While assessing practices in most states vary in respect of the relation in time between assessing, or tax dates, and corresponding tax years, the New Jersey statutes have for a long time fixed assessing dates which antedated the commencement of the tax year. Until 1960, as noted above, October 1 of the prior year was designated the assessing date for both real and personal property, *R.S.* 54:4-1, and the date was moved back in 1960 to January 1 of the prior year for tangible personal property used in business. See above. A reasonable time interval between assessing date and tax year has obvious functional justification. In New Jersey statutory theory, the local assessor examines the property on the assessing date and carries on the work of valuation and assessment from then until January 10 following, when he files his completed list of assessed valuations with the county board of taxation. *N.J.S.A.* 54:4-35. That body then conducts an administrative review of the

assessment lists, and certifies the lists to the local collectors after revising, on or before May 1. *N.J.S.A.* 54:4-55. Taxes assessed are payable quarterly during the tax year. *N.J.S.A.* 54:4-66, and assessments are appealable to the county board on or before August 15. *N.J.S.A.* 54:3-21. Further appeals to the State Division of Tax Appeals and the Appellate Division of the Superior Court are also provided for.

Under the recent statutory amendments applicable to tangible personal property used in business, a considerable amount of information must be collated before assessment valuation ratios and tax rates for any tax year can be determined for such property. See, *e.g. L.* 1963, c. 9; *L.* 1964, c. 141; and *L.* 1966, c. 138. Presumably, the time period between assessing date and tax year was extended (by moving the assessing or listing date back to January 1 of the prior year) in order to render the administration of the foregoing revised assessing procedures more convenient and feasible. In these circumstances, the time spread between assessing date and tax year is not unreasonably great, and respondent does not argue the contrary. We see no reason why, in the light thereof, our statutory scheme should be held vulnerable on due process grounds when applied to exact a tax for personal property permanently present in and receiving governmental services from the municipality and State on and as of January first of a given year merely because the assessment will not be formally entered in the books and the taxpayer not be billed for and required to pay the tax until the following calendar year, pending which he removes the property from the State.

The assessment in question is valid. The judgment of the Division of Tax Appeals is

Reversed.

Judgment and Mandate on Affirmance

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 6446

Civil Action On Appeal

[SAME TITLE]

It is thereupon ordered and adjudged that the judgment of the Superior Court, Appellate Division is affirmed with costs and it is further ordered that the record be remitted to the Division of Tax Appeals, Department of the Treasury to be there proceeded with in accordance with the rules and practice relating to that department, consistent with the opinion of this Court.

Witness the Honorable Joseph Weintraub, Chief Justice.

Judgment Entered June 2, 1969.

Mandate Issued June 12, 1969.

A True Copy

John H. (Illegible)
Clerk of the Supreme Court

Opinion Per Curiam

SUPREME COURT OF NEW JERSEY

A-137 September Term 1968

[SAME TITLE]

Argued May 19, 1969. Decided June 2, 1969.

On appeal from a judgment of the Superior Court, Appellate Division, whose opinion is reported at 101 *N. J. Super.* 45.

Mr. Prospero N. Bove argued the cause for the appellant (*Messrs. Milton, Kean & Bove*, attorneys; *Mr. John H. Wigley* on the brief).

Mr. Nicholas A. Pasquale argued the cause for the respondent, City of Bayonne.

Mr. Arthur J. Sills, Attorney General, filed a statement in lieu of brief for the respondent, Division of Tax Appeals (*Mr. Charles H. Landecker*, Deputy Attorney General, of counsel).

PER CURIAM

The judgment is affirmed for the reasons expressed in the opinion of Judge Conford in the Appellate Division.

Supreme Court of the United States

October Term, 1969

No. 542

INTERNATIONAL SOCKET CO., INC.,

Appellant

versus

CITY OF BAYONNE,

Appellee

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS APPEAL

Nicholas A. Pascrello
Attorney for *Appellee*
City Hall
Avenue E and 30th Street
Bayonne, New Jersey

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Supreme Court of the United States

October Term, 1969

No. 542

International Nickel Co., Inc.,

Appellant,

versus

City of Bayonne,

Appellee.

On Appeal from the Supreme Court of New Jersey.

MOTION TO DISMISS APPEAL

Statement

This motion to dismiss the appeal is made since there is no substantial Federal question presented for review.

Orders and Opinions of the Courts Below

On August 31, 1964 pursuant to N.J.S.A. 54:4-44, the appellant International Nickel Co., Inc. executed and filed personal property tax forms P.T.1 and P.T.2 for the year 1965 with the Tax Assessor of the City of Bayonne. Pursuant to N.J.S.A. 54:4-41 the Tax Assessor, upon receipt of these forms, assessed the appellant for its personal property.

The appellant appealed the assessment of the personalty for the year 1965. The Hudson County Board of Taxation

Jurisdiction of This Court

question the validity of a statute of any state on the ground of its being repugnant to the Constitution ... of the United States ..." is entirely a fabrication.

No Question Under the Federal Constitution is Involved

The appellant contends that the statutory construction offered by the Superior Court, Appellate Division, and affirmed by the Supreme Court of New Jersey allowing the City of Bayonne to tax for personality not within the district during the "tax year" is unreasonable and, as such, renders the statute unconstitutional in violation of the due process and equal protection clauses of the Federal Constitution.

On the surface such construction may appear unreasonable; however, a clear view of the State Courts' insight into the taxing process clearly emphasizes its reasonableness. The appellant in his contentions dismisses the construction of the appellate court concerning the concept of the tax year. The court ruled that while the taxing scheme permits the tax to be designed for the calendar year 1961, the tax is exacted as for services rendered the property during the year 1961 (Appendix 13a). With this construction in mind, it becomes obvious that the appellant could in no way have been deprived of property without due process of law since the property had permanent situs within the district during the year for which the taxes were actually being charged (Appendix 13a).

The appellant claims that such a ruling is inconsistent with the prior judicial decisions of New Jersey, citing *Lehigh Valley R.R. Co. v. New Jersey State Board of Taxes and Assessments*, 105 N.J.L. 313 (1929). In that case, however, the New Jersey Court of Errors and Appeals was construing the legislative intent applicable to the Real

road Tax Act of 1888. This they found to be that the taxes payable by February 1 of a particular year were in fact the taxes for that year. In this instance, however, the highest court of New Jersey has affirmed the construction of L. 1966, c. 138, sec. 1 to provide that the taxes payable in 1965 shall in fact be for the governmental services rendered in 1964.

We note also that in *New York Central R.R. Co.* v. *Dept. of Taxation*, 137 N.J.L. 288 (Sup. Ct. 1948) cited by the Appellate Division, "the court, while recognizing the general principle 'that the power of the state to tax is limited to subjects within its jurisdiction' (at 294) was confronted only with the question whether floating equipment of the railroad taxpayer used for transportation of freight in the Hudson River and New York Harbor was validly taxed by New Jersey under the Railroad Tax Law of 1941, which provided for a formula of assessed valuation based upon proportionate time of presence of equipment in this state. The court sustained the tax as against a contention that the sole taxable situs of the property was in New York, where the owner corporation was domiciled. It is of present interest that there was no question raised concerning the validity of the statutory formula which based the proportionate valuation aforementioned on experience during the *preceding* tax year. In other words, the incidence of location of the property *during the tax year* was irrelevant to the validity of the assessment." (Court's emphasis.) (Appendix 9a).

Thus, any conflict which the appellant finds is both constructed and meaningless.

Since the property had a permanent situs within the taxing district during 1964 and was present in the district on the assessing day, the owner was liable for the taxes although they became due in 1965.

CONCLUSION

For the reasons advanced above, it is urged that the appeal brought by the appellant be dismissed.

Respectfully submitted,

NICHOLAS A. PANEPINTO
Attorney for Appellee

(APPENDIX)

Opinion by Stanziale, *J.* in Division of Tax Appeals

May 8, 1968

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF TAX APPEALS

Docket No. L 405-65

INTERNATIONAL NICKEL CO., INC.,

Petitioner,

versus

CITY OF BAYONNE,

Respondent.

(Case No. 71, Calendar of September 27, 1967,
Heard January 23, 1968 Newark.)

Appearances:

MESSRS. MILTON, KEANE & DE BONA.
By: JOHN J. HANLON, JR., Esq., for Petitioner.
NICHOLAS A. PANEPINTO, Esq., for Respondent.

STANZIALE, *J.*:

This is an appeal by the International Nickel Co. of the assessment of the City of Bayonne for the year 1965 in the amount of $221,362.76 on personal property allegedly located in Block 432 Lot 1A, Block 437 Lot 1A, and Block 431½ Lot A, Oak Street, Bayonne, N. J.

Opinion by Stanziale, J. in Division of Tax Appeals

A stipulation of facts and memorandas of law were submitted by the parties. Since the parties were not in agreement as to when the personal property was removed from the jurisdiction, a hearing was scheduled and testimony was presented by the parties.

Petitioner produced testimony by its chief accountant that prior to January 1, 1965, to wit, on December 31, 1964, Petitioner owned no personal property on the premises described, the same having been transferred to Sterling Forest, N. Y. It also appeared that on December 31, 1964 the company sold all its real estate at the said location and the assessor for the City on cross-examination admitted that there had been no assessment of real property against International Nickel for the year 1965, the assessor knowing that during that year International did not own the real estate at the said location. No moving permit is required in the City of Bayonne for the moving of personal property and no evidence was adduced to show that any personal property of petitioner was in the State of New Jersey at any time during the year 1965.

Respondent City of Bayonne contends that by reason of R. S. 54:4-11 "The taxable values of tangible personal property . . . shall be determined as of January 1, 1964, which shall be the listing date with respect to taxes payable in the year 1965, and as of a listing date of January 1st annually thereafter, which date shall be the date as of which the assessment is made," and that, therefore, the presence of personal property in Bayonne during 1964 results in a tax for the year 1965. (It is conceded that the taxes for the year 1964 were fully paid by petitioner). Hence, following the filing of PT-1 and PT-2 forms on August 31, 1964 showing a depreciated book value of personal property in the sum of $1,064,244.03, the respondent applied the common level of .208 and arrived at the disputed tax.

R. S. 54:4-1 provides:

> "All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter. Such property shall be valued and assessed at the taxable value prescribed by law . . ."

It appears to us that the section upon which the respondent relies, namely R. S. 54:4-11, is referable to the last sentence quoted immediately above, and has to do with the means of valuing and assessing and the time thereof, for the obvious purpose of appropriate administration of the taxing Act. It does not depart from the cardinal principle that the right to tax depends upon power over the subject matter taxed, as recognized by the words "within the jurisdiction of this State" as stated in R. S. 54:4-1. The latter section states "what" is to be taxed; the section relied on by the respondent prescribed implementation for R. S. 54:4-1.

There being no personal property in this State for the year for which a tax is sought to be levied, it follows from the above quoted statute that there is nothing to tax. See *N. Y. Central R. R. Co.* v. *Dept. of Taxation, &c.*, 137 N. J. L. 288, aff'd 1 N. J. 298 (1949). The preparation to tax by filing of the PT forms and their receipt by the municipality cannot have the effect of making the putative subject matter taxable.

Judgment for petitioner accordingly.

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—December 13, 1968)

Argued November 12, 1968 Decided Dec. 13, 1968

Before JUDGES CONFORD, KILKENNY and LEONARD.

On appeal from the Division of Tax Appeals, Department of the Treasury, State of New Jersey.

MR. NICHOLAS A. PANEPINTO argued the cause for appellant.

MR. PROSPERO DEBONA argued the cause for respondent (MESSRS. MILTON, KEANE & DEBONA, attorneys; MR. JOHN B. WEFING, on the brief).

MR. ARTHUR J. SILLS, Attorney General of New Jersey, filed Statement in Lieu of Brief on behalf of respondent Division of Tax Appeals (MR. CHARLES H. LANDESMAN, Deputy Attorney General, of counsel).

The opinion of the court was delivered by CONFORD, *S.J.A.D.*

The City of Bayonne appeals the cancellation by the Division of Tax Appeals of a personal property tax levied by its assessor for the tax year 1965 on personal property of International Nickel Co. The taxpayer possessed taxable personal property, used in its business, in the Bayonne taxing district on January 1, 1964, the assessing date for 1965 taxes, *N.J.S.A.* 54:4-11 (as amended by *L.* 1964, *c.* 141), but removed all of it from this State to the states of New York and West Virginia during the year 1964, so that none of it was in Bayonne on January 1, 1965 or thereafter.

The action of the Division was predicated on the theory that *N.J.S.A.* 54:4-1, providing for taxation of real and

personal property "within the jurisdiction of this State," precluded the assessment for 1965 by a New Jersey taxing district of personal property which was physically beyond the borders of the State before the calendar year 1965 began. Bayonne contends that the status and location of the property on January 1, 1964, the statutory listing or assessing date for the tax year 1965, controls as to Bayonne's right to impose the tax for that year. The taxpayer responds that Bayonne's construction of the tax statute would render it invalid as violative of the due process clause of the 14th Amendment to the United States Constitution.

Our careful consideration of the arguments of the parties and our independent research lead us to the firm conclusion that the taxing district's appeal must be sustained and the assessment restored. The legislative intention is that property found in the taxing district on the statutory assessing date is taxable therein for the corresponding tax year, although removed therefrom subsequent to the assessing date. Our tax statutes, as thus construed, do not offend due process even where the removal antedates the so-called tax year.

I.

A review of the pertinent legislation should be preceded by the observation that beginning in 1960 there was in this State a period of intense public controversy over, and of a number of legislative amendments of the law in respect of the taxation of tangible personal property, especially such as is used in business. See, *e.g.*, *Switz* v. *Kingsley*, 37 N.J. 566 (1962); *Zito* v. *Kingsley*, 92 N.J. Super. 37 (App. Div. 1966). Detailed review of all of these enactments, several of which remained in suspen-

sion for varying periods of time, need not here be undertaken, as none of this legislation affects the basic principle we find to have characterized our tax law for decades, *i.e.*, that the tax status of property, whether for purposes of exemption, valuation or assessing location, is fixed as of the assessing date, except where in some instances it has been specifically otherwise provided by the Legislature. "See *East Orange* v. *Palmer*, 47 N.J. 307, 320-21 (1966)."

N.J.S.A. 54:4-1, prior to amendment by *L.* 1960, *c.* 51, called for the taxation of "all property real and personal within the jurisdiction of this State [not expressly exempted or excluded]" annually at its true value and recited that "[a]ll property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

N.J.S.A. 54:4-9, prior to the 1960 amendment, provided: "The tax on all tangible personal property in this State shall be assessed in and for the taxing district where the property is found."

The 1960 statute eliminated "true value" as the basis for assessment of tangible personal property and introduced a new classification of taxable personal property used in business. The assessing standard for the latter was to be "fair value," presumed to be the net book value of the property "as of the listing date." *L.* 1960, *c.* 51, Sections 4, 5. Later amendments provided for new and lower valuation bases and tax rates for assessment of various categories of tangible personalty used in business.

The assessing date for the new tax category of tangible personal property used in business was changed by *L.* 1960, *c.* 51, § 8 from the prior October 1 to the prior January 1, the act providing that January 1, 1961 "shall be the listing date with respect to taxes payable in the year 1962," and correspondingly for subsequent tax years. (For

convenience we use the term "assessing date" rather than "listing date" herein.) This scheme was carried forward through the tax year 1965 and thereafter by *L.* 1964, c. 141, § 3 ("The taxable value shall be determined as of January 1, 1964, which shall be the listing date with respect to taxes payable in the year 1965," and correspondingly for subsequent tax years).

Insofar as concerns the *place* of taxation of tangible personal property used in business, the 1960 act (*c.* 51) retained the previous basic concept, and called for assessment thereof "at the general tax rate of the taxing district wherein such property is found, for the use of such taxing district." Section 7, amending *R.S.* 54:4-9. This concept as to the place of taxation was continued in *L.* 1964, *c.* 141, above referred to, as was the long-existent rule of personal liability for such taxes of the "person lawfully assessed" (Section 1).

While apparently no New Jersey statute, past or present, can be found expressly to say, in so many words, that tangible personal property is assessable by that taxing district in which it is found on the assessing date, the whole tenor of the taxing statutes as of any given time in our modern history has spelled out that unmistakable intent. It was stated, for example, in *Shillingsburg* v. *Ridgway*, 69 *N.J.L.* 113 (Sup. Ct. 1903), that "visible personal property" is assessable at the place where found "on the day . . . for commencing the assessment" (a then-current paraphrase for "assessing date," "tax date," etc.). To the same effect see *Tennant* v. *State Board of Taxes and Assessments*, 95 *N.J.L.* 465 (*E. & A.* 1921) (syllabus). This has, to our knowledge, been the practical construction accorded the statutes, over the years, by the taxing authorities of this State on every level, and we are aware of no challenge heretofore to the principle that the statutory assessing date controls the incidence of the legal place of assessment of tangible personal prop-

erty (subject to qualifying principles as to non-taxable *status* of such property in the taxing district, as where only temporarily situated, or in transit in interstate or foreign commerce, etc., when found in such taxing district on the assessing date).

Indeed, we do not understand the taxpayer to challenge the foregoing, except in application to a case like this where the property in question has been removed from the state taxing jurisdiction prior to commencement of the calendar tax year. In such instance, so it is argued, the United States Constitution prohibits the levy even if the property was found there on the assessing date; consequently the taxing statutes should be construed consonantly with the constitutional rule. We address ourselves to that argument.

II.

Preliminarily, we observe that in none of the cases cited by the taxpayer or the Division of Tax Appeals is there a square holding supportive of the position asserted. Indeed, we find no prior case in which a court has been asked to determine that property found in a state on the assessing date fixed by the statutes thereof in reference to a particular tax year is constitutionally untaxable by that state or its political subdivisions because not present therein during the tax year.

We deal first with the New Jersey decisions relied upon by taxpayer. It quotes from *Bogota* v. *Brewster Equip. Co.*, 83 *N.J. Super.* 586, 606 (*App. Div.* 1964):

> "To allow Bogota to tax tangible personalty located in California, Utah, New York and Pennsylvania *on October 1, 1959 and October 1, 1960* would result in a denial of due process of law—such property then being permanently located in those states

and employed there in the prosecution of Brewster Company's business." (Emphasis added.)

The foregoing was written in reference to a holding that road construction equipment never within the boundaries of the State was not assessable by a New Jersey taxing district merely because the offices of the owner-corporation were situated there. It was held that the property in question was *on the respective assessing dates* physically located and intended for permanent use and disposal in other states—therefore had a taxable situs there and not in New Jersey. Actually, the reference to the assessing dates—October 1, 1959 and October 1, 1960—in the quoted excerpt from the *Brewster opinion*, is inferential that if the property were in New Jersey on the mentioned taxing dates it would be assessable in this State.[1]

In *N. Y. Central R. R. Co. v. Dept. of Taxation, etc.*, 137 *N.J.L.* 288 (*Sup. Ct.* 1948), cited by the Division and taxpayer, the court, while recognizing the general principle "that the power of the state to tax is limited to subjects within its jurisdiction" (at 294), was confronted only with the question whether floating equipment of the railroad taxpayer used for transportation of freight in the Hudson River and New York Harbor was validly taxed by New Jersey under the Railroad Tax Law of 1941, which provided for a formula of assessed valuation based upon proportionate time of presence of the equipment in this State. The court sustained the tax as against a contention that the sole taxable situs of the property was New

[1] However, mere presence of personal property in a taxing district on the assessing date will not assure its taxability there if it was present there only temporarily. In such case it is assessable at the residence of its owner. *George M. Brewster & Son, Inc. v. Bor. of Bogota* 20 N.J. Super. 487 (*App. Div.* 1952).

York, where the owner corporation was domiciled. It is of present interest that there was no question raised concerning the validity of the statutory formula which based the proportionate valuation aforementioned on experience during the calendar year *preceding* the tax year.[2] In other words, the incidence of location of the property *during the tax year* was irrelevant to the validity of the assessment.

The leading federal decision for the proposition that a state's effort to assess property beyond its borders offends the due process rights of the taxpayer, and cited by the respondent herein, is *D. L. & W. R. Co.* v. *Pennsylvania*, 198 *U.S.* 341 (1905). The taxpayer was subjected by Pennsylvania to a corporate capital stock tax without allowing it a deduction for coal owned by the company which, by the time of the assessing period, referred to in the opinion as the "time the appraisement was made"[3] (at 345), had been transported out of the state and was being held by the taxpayer elsewhere awaiting sale to the company's customers. The United States Supreme Court held that the taxation of the capital stock was, in effect, a taxation of the company assets including the coal in question, and therefore, to the extent that the assessed valuation reflected the value of tangible property beyond the borders of the state as of the time of statutory tax appraisal of

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[2] It may further be noted that the railroad tax law, like the personal property tax act here involved, fixes the assessing date for all property in railroad use at January 1 of the year preceding the tax year. However, it expressly excludes property passing out of railroad ownership between January 1 and October 1, *N.J.S.A.* 54:29A-17 (presumably to enable it to be assessed locally rather than by the State).

[3] The Pennsylvania statute provided for assessment of the stock at the value between November 1 and November 15 of each year for the tax year ending in said November.

the property, it constituted a taking of the taxpayer's property without due process of law. It is apparent from the court's analysis that, far from supporting the present taxpayer's position, the decision implies the contrary. It holds that the critical time for determining whether the property is constitutionally untaxable by the state because absent is the time as of which the statutory appraisal is to be made (in other words, the assessing date). "Taking the different prices of the stock at different times in the year, and the average price thereof, and otherwise following the provisions of the statute, simply makes a way of finding the value of the stock between the 1st and 15th of November in each year. That is the material time when the value is to be ascertained, and at this time the coal was not in the state." (198 *U.S.*, at 357-58).

It is to be noted that the result of the decision was that Pennsylvania lost the tax even though the coal, or part of it, was within its borders at some time or times *during the tax year*, for the sole reason that it was not present there as of the assessing date. For the same result, in a case where the assessing date was fixed at the beginning of the tax year, see *Overstreet* v. *Ty-Tan, Inc.*, 48 *So. 2d* 158 (*Sup. Ct. Fla.* 1950). The present Bayonne assessment accords with the rule of the *D. L. & W. R. Co.* case, since the property in question *was* in Bayonne on the assessing date.

Other decisions of the United States Supreme Court cited by respondent for the constitutional rule espoused are not here helpful, since none of them involves any question concerning the determinative character of the statutory assessing date in relation to the absence of the taxed property from the taxing jurisdiction. See *Norfolk & Western Railway Company* v. *Missouri State Tax Commission*, 390 *U.S.* 317 (1968); *Frick* v. *Pennsylvania*, 268 *U.S.* 473 (1925); *Union Refrigerator Transit Co.* v. *Kentucky*, 199 *U.S.* 194 (1905).

In the closely analogous field of constitutional limitation of state taxing power in respect of goods being shipped in foreign commerce, both the courts and all the parties involved in *Empresa Siderurgica, S. A.* v. *Merced* (337 *U.S.*, 154 (1949), affirming the decision of the California Supreme Court, 32 *Cal. 2d* 68, 194 *P. 2d* 527 (1948), assumed without question that the exempting export status of the property in question was to be determined as of the California statutory tax date (March 5, 1945, for the tax year 1945-1946) (337 *U.S.*, at 155). It is further significant that the property held taxable by California because not in course of transit as of the tax date was entirely out of the state on an ocean carrier well before the end of the tax year. (337 *U.S.* at 155). *Cal. 2d* 286, 65 *P. 2d* 791 (*Sup. Ct.* 1937). The court rejected a jeweler's appeal from a 1935 assessment by the county on part of his jewelry stock-in-trade which he had transported to Hawaii prior to the "tax date" (March 4, 1935) and brought back to Los Angeles soon after that date. The purposes of the trip were concededly two: (a) to show the articles to potential customers in Hawaii and (b) to evade taxation on the property for the year 1935. The taxpayer's argument was that the motive of removal was irrelevant—the property was excluded from taxation because absent from the state on tax day. The rejection of that position by the Court, like the reasoning in our own decision in *George M. Brewster & Son, Inc.* v. *Bor. of Bogota, supra, n.* 1, was that the removal of the goods from their permanent Los Angeles situs was merely temporary, and thus insufficient to transfer their taxable situs. It is not our position in the instant case that *mere* presence of personal property within a state at the assessing date is determinative of taxability therein. The presence must be of a permanent character as of that date, as was the case with the present respondent's property as of January 1, 1964.

Opinion of the Superior Court of New Jersey, Appellate Division

In *Commonwealth* v. *Westinghouse Air Brake Co.*, 251 *Pa.* 12, 95 *A.* 807 (*Sup. Ct.* 1915), also cited by respondent, the significance of the assessing date was not an issue. The case simply follows the general, undisputed rule precluding taxation of property permanently beyond the borders of the taxing state.

The controlling significance of the assessing date was adjudicated in *Overstreet* v. *Ty-Tan, Inc., supra,* and also in *Stebco, Inc.* v. *Gillmouthe,* 189 *Or.* 427, 221 *P.* 2*d* 914 (*Sup. Ct.* 1950), cert. den. 340 *U.S.* 920 (1951), a case primarily concerned with a contention that the goods taxed were exempt as being in the course of interstate commerce, where it was said (at 919), " * * * the law presumes that all property, such as that before us, is subject to taxation at the place where it was on tax day."

Reflection concerning the rationale for the due process basis for denying the power of taxation over personal property absent from the state will reflect the lack of merit in respondent's invocation of the doctrine here. The theory is that for a state which offers no governmental services in relation to property, as where it is physically absent from the jurisdiction, to levy a tax on it is so unfair and unjustified as to be tantamount to taking the taxpayer's property without due process. *Union Refrig. Transit Co.* v. *Kentucky, supra* (199 *U.S.*, at 202); "the [due process] question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State," *Norfolk & Western R. Co.* v. *Missouri Tax Com., supra* (390 *U.S.*, at —, *n.* 5).

The tax the Division nullified here was for governmental services and protection which taxpayer's personal property was receiving from Bayonne and from New Jersey as of January 1, 1964, when that property was permanently situated in Bayonne. The fact that in the

statutory tax scheme the tax is denominated as "for" 1965 and permits the taxpayer to pay it in the latter calendar year does not gainsay the truth of the foregoing assertion. Nor does that fact palliate the escape from tax contribution for the governmental services and protection as of the date referred to if International Nickel Co. were to succeed in voiding this assessment. The taxes paid by the corporation to Bayonne *in* 1964 do not cover the obligation, as those were for the protection and services it was receiving as of January 1, 1963. Under our statutory scheme no taxpayer pays taxes for more tax years than the number of assessing dates on which he possesses tangible personalty within the borders of the state.

There is no talismanic quality or significance of constitutional dimension in the "tax year" such that absence from the State of personal property all during that year should automatically invalidate an assessment denominated "for" that year but statutorily based upon location in the State of property upon a certain date preceding, but not unduly remote therefrom, and reasonably referable to that year. The tax here contested does, in the language quoted above from *Norfolk & Western R. Co.* v. *Missouri Tax Com.*, "in practical operation [have] relation to opportunities, benefits, or protection conferred or afforded" by New Jersey and Bayonne.

While assessing practices in most states vary in respect of the relation in time between assessing, or tax dates, and corresponding tax years, the New Jersey statutes have for a long time fixed assessing dates which antedated the commencement of the tax year. Until 1960, as noted above, October 1 of the prior year was designated the assessing date for both real and personal property, *R.S.* 54:4-1, and the date was moved back in 1960 to January 1 of the prior year for tangible personal property used in business. See

above. A reasonable time interval between assessing date and tax year has obvious functional justification. In New Jersey statutory theory, the local assessor examines the property on the assessing date and carries on the work of valuation and assessment from then until January 10 following, when he files his completed list of assessed valuations with the county board of taxation. *N.J.S.A.* 54:4-35. That body then conducts an administrative review of the assessment lists, and certifies the lists to the local collectors after revising and correcting the assessments contained therein, as may be necessary, on or before May 1. *N.J.S.A.* 54:4-55. Taxes assessed are payable quarterly during the tax year. *N.J.S.A.* 54:4-66, and assessments are appealable to the county board on or before August 15. *N.J.S.A.* 54:3-21. Further appeals to the State Division of Tax Appeals and the Appellate Division of the Superior Court are also provided for.

Under the recent statutory amendments applicable to tangible personal property used in business, a considerable amount of information must be collated before assessment valuation ratios and tax rates for any tax year can be determined for such property. See, *e.g.*, *L.* 1963, *c.* 9; *L.* 1964, *c.* 141; and *L.* 1966, *c.* 138. Presumably, the time period between assessing date and tax year was extended (by moving the assessing or listing date back to January 1 of the prior year) in order to render the administration of the foregoing revised assessing procedures more convenient and feasible.

In these circumstances, the time spread between assessing date and tax year is not unreasonably great, and respondent does not argue the contrary. We see no reason why, in the light thereof, our statutory scheme should be held vulnerable on due process grounds when applied to exact a tax for personal property permanently present in and receiving governmental services from the municipality

and State on and as of January first of a given year merely because the assessment will not be formally entered in the books and the taxpayer not be billed for and required to pay the tax until the following calendar year, pending which he removes the property from the State.

The assessment in question is valid. The judgment of the Division of Tax Appeals is

Reversed.

Transcript of Proceedings Before the Division of Tax Appeals

Tuesday, January 23, 1968
Council Chambers, City Hall
Newark, New Jersey

Before:

INEZ STANZIALE, Hearing Officer.

Appearances:

MESSRS. MILTON, KEANE & DE BONA,
Attorneys for Petitioner,

By: JOHN J. HANLON, JR., ESQ.

NICHOLAS A. PANEPINTO, ESQ.,
Attorney for Defendant.

The Hearer: It is my understanding Mr. Hanlon and Mr. Bonapinto, that there was to be a stipulation of fact and a memorandum filed in this particular case and I was to prepare my judgment based on the submission of these items. When I received the stipulation of the facts, I found that there was no agreement as to a very important fact, and that is whether there was personal property in the taxing district on January 1st, 1964 for the taxing year '66.

Mr. Panepinto: They are appeals for the 1965 taxes.

The Hearer: I said taxes 1964. '64 is the listing date for '65 so I was right. But there was disagreement as to whether there was personal property in the taxing district of January 1st—

Mr. Hanlon: 1965.

Mr. Panepinto: But according to the personal property tax form it was filed on August 31st, 1964 for the 1965 period.

Mr. Hanlon: Of course, for the record, it is in the briefs, that this is merely a formula for the guidance of the taxing

authority, that you have to read the entire act, and Section 1 of the act provides that property located in the taxing district in the taxing year 1965 shall be taxed in the following manner. And then one of the directives as to the manner in which it is to be taxed is to use a basis and the basis is arrived at by what was in the taxing district in the preceding January 1st period. So that the taxpayer not having any property in the taxing district in 1965, the first section of the taxing Act must come into effect and there being no property in the taxing district against which this formula can be applied that no taxes are available, no taxes are due.

The Hearer: That is why we are here this morning, gentlemen.

Mr. Hanlon: Right.

The Hearer: Because there seems to be a disagreement and I thought we better have a hearing and have it in the record so that a proper determination can be made.

Mr. Bonapinto: For the record, your Honor, we are all familiar with the fact that on October 1st, the preceding year, the taxable year was the access date and it was changed by N.J.S.A. 54:4-111, which made January the 1st of the preceding year where the taxes are due of the municipality. I just want to get that into the record.

Mr. Hanlon: Yes.

The Hearer: Mr. Hanlon, are you ready?

Mr. Hanlon: Mr. Mecke, please.

HENRY O. MECKE, sworn.

Direct examination by Mr. Hanlon:

Q. Mr. Mecke, by whom are you employed? A. International Nickel Company.

Q. And how long have you been employed by International Nickel Company? A. 28 years.

Q. And what is your present position? A. I am chief accountant for taxes.

Q. Chief accountant for taxes? A. Yes.

Q. And did you have that same position in 1963, '64 and '65? A. Yes.

Q. Now, in connection with that position, are you familiar with the personal property holdings of International Nickel? A. Yes.

Q. Do you need to have this information in order to file returns that you handle? A. Yes.

Q. Now, referring to the personal property, which was located in the City of Bayonne, and what is known as Block 432, Lot 1A, Block four and a half, Lot A, and also commonly known as the Oak Street premises in Bayonne, can you tell us, if you will, how happened to all of the personal property which was located in those premises during the year 1964? A. In 1964, sometime around the middle of the year, the research laboratory, which was located on Linnet Street was moved to Sterling, New York, and over a period of several months all the personal property was transferred to the new facility, to Sterling Forest, New York, with the exception of a few odds and ends that could not be utilized.

Q. Now, was some of this material also transferred to another plant, if you recall? A. Yes. Also during that period there was some transfer of property on a rolling mill facility in Huntington, West Virginia.

Q. And was this accomplished during '64, the year 1964? A. Yes.

Q. Now, Mr. Mecke, on December 31st, 1964 did the company sell its property, the real estate? A. Yes.

Q. Did title pass of December 31, 1964 to all of the real estate owned by International in Bayonne? A. Yes.

Transcript of Proceedings Before the Division of Tax Appeals

Q. At that time, when the title passed to someone else on December 31, 1964, did International own any personal property located on those premises? A. No.

Q. Had all of the personal property been removed during the year 1964? A. Yes.

Mr. Hanlon: That is all.

The Hearer: Thank you.

Cross-examination by Mr. Panepinto:

Q. Mr. Mecke, you testified that—

Mr. Hanlon: Now, just to save time, there was a P.T. 1 filed in August, 1964.

Mr. Panepinto: I want to bring out a very important thing, your Honor. He testified that quite a bit of this personal property was moved out in the middle of 1964, and this was filed on August the 31st.

Mr. Hanlon: That was in there, January 1st, 1964.

The Hearer: Right.

Mr. Panepinto: Well, may I submit this in evidence?

The Hearer: Pardon me?

Mr. Panepinto: May I show this gentleman this report?

The Hearer: You may, if there is no objection.

Mr. Hanlon: No objection.

By Mr. Panepinto:

Q. Sir, you are familiar with Gould, the deputy comptroller of your company? A. Yes.

Q. I show you a tax year 1965 form, P.T. 1 and a P.T. 2, 1965, both dated August the 31st, 1964 and signed by—I don't know, N. J. Gould, Deputy Comptroller for International Nickel—it is W. J. Gould, Deputy Comptroller.

Now, can you please tell us what the net book value of the equipment is? A. This value is the value at January 1, 1964 from our corporative records.

Q. Now, this is indicated— A. August 31st, 1964.

Q. Is there any notation—

The Hearer: Excuse me. Will you give me the net book value as reported?

The Witness: $1,064,244.03.

Q. That is on the P.T. 1? A. Yes.

Q. Now, will you tell the Court what is on the P.T. 2 Form, the value? A. P.T. 2 Form, the net depreciable personal property, as of December 31, 1963, is reported at $1,064,244.03.

Q. Now, is there any notation on this form which notifies or puts the City of Bayonne on notice that some of this equipment was moved out? A. There is no such notation.

Q. Did you know whether the City of Bayonne was ever notified orally or by notice that some of this equipment was transferred out of the taxing district of the City of Bayonne on the year 1964? A. I have no such knowledge.

Q. Do you know of your own knowledge, by personal inspection, that the equipment was removed out of the taxing district prior to December 31, 1964, or was it just by books? A. Just by books.

Q. In other words, you did not go down to the plant to see whether the physical equipment was removed? A. No, sir.

Mr. Panepinto: That is all.

Mr. Hanlon: No further questions.

Transcript of Proceedings Before the Division of Tax Appeals

The Hearer: Thank you. You may step down. (Witness excused.)

Mr. Panepinto: Mr. Solonyenka, please.

MYRON SOLONYENKA, sworn.

Direct examination by Mr. Panepinto:

Q. What is your position? A. Tax Assessor, City of Bayonne.

Q. And how long have you been Assessor? A. Since 1963.

Q. Did you receive a P.T. 1 Form and a P.T. 2 Form dated August 31, 1964 from International Nickel Company? A. Yes, I did.

Q. Is this the form you received? A. That is correct.

Q. And the figures that show on the P.T. 1, the net figure that was stated by Mr. Mecke, is that the figure that is on the return? A. Correct.

Q. $1,064,244.03? A. Correct.

Q. They appear on both returns? A. Correct.

Q. Did you receive any notification from International Nickel at the time you received these forms that their personal property was being removed? A. Nothing at all.

Q. Did you receive any notice written or oral from the taxpayer, International Nickel, during the year 1965 that they were moving out? A. No.

Mr. Panepinto: That is all.

Cross-examination by Mr. Hanlon:

Q. Did you know that title passed to the property on December 31, 1965? A. No, I didn't.

Q. No? A. No.

Q. You do know since? A. I know since.

Q. That it did pass? A. As far as I know.

Q. As far as you know the records show— A. As far as I know the records show, and I think the contract was signed, but I don't know whether the title passed.

Q. You don't know whether the title passed? A. Title passed.

The Hearer: Excuse me. I can't hear.

The Witness: I am sorry. Title passed.

The Hearer: When did title pass?

The Witness: I don't know. I haven't got the date.

Q. You didn't assess International Nickel for the real property in '65 did you? A. No, I didn't.

Q. You are an assessor? A. Yes.

Q. So you have to know these things? A. Right.

Q. So that you know that after January 1st, 1965 International did not own the real estate there? A. That is correct.

Q. Are you familiar with the moving laws of the City of Bayonne? A. No, I am not.

Q. You don't know that when somebody moves personal property in the City of Bayonne you had to get a permit? A. They do not.

Q. They do not have to get a permit? A. No.

Mr. Hanlon: That is all.

The Hearer: All right. Thank you.

(Witness excused.)

The Hearer: All right. Thank you, gentlemen, for coming out to Newark so that we could have a hearing on this phase of the matter. I am sorry. I was ready to write my opinion when I saw this factual

contention that wasn't resolved, and I immediately called Mr. Hanlon and Mr. Panepinto and suggested, or requested, that we have a hearing. I am going to have to reserve decision because there seems to be a question as to what happened.

Thank you, gentlemen.

* * * *

Judgment and Mandate on Affirmance by Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 6446

Civil Action on Appeal

[SAME TITLE]

It is hereupon ordered and adjudged that the judgment of the Superior Court, Appellate Division is affirmed with costs and it is further ordered that the record be remitted to the Division of Tax Appeals, Department of the Treasury to be there proceeded with in accordance with the rules and practice relating to that department, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice.

Judgment Entered June 2, 1969.

Mandate Issued June 12, 1969.

A TRUE COPY

s/ JOHN H. GILDES
Clerk of the Supreme Court

Opinion Per Curiam—Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

A-137 September Term 1968

[Same Title]

Argued May 19, 1969. Decided June 2, 1969.

On appeal from a judgment of the Superior Court, Appellate Division, whose opinion is reported at 104 *N. J. Super.* 45.

Mr. Prospero De Bona argued the cause for the appellant (Messrs. Milton, Kean & De Bona, attorneys; Mr. John B. Wefing on the brief).

Mr. Nicholas A. Panepinto argued the cause for the respondent, City of Bayonne.

Mr. Arthur J. Sills, Attorney General, filed a statement in lieu of brief for the respondent, Division of Tax Appeals (Mr. Charles H. Landesman, Deputy Attorney General, of Counsel).

Per Curiam

The judgment is affirmed for the reasons expressed in the opinion of Judge Conford in the Appellate Division.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

INTERNATIONAL NICKEL CO., INC. *v.*
CITY OF BAYONNE

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 542. Decided December 8, 1969

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.